IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 11TH AUGUST 2006 / 20TH SRAVANA 1928

Crl.L.P..No. 408 of 2006()

CC.1155/2000 of JUDL.M.F.C.-I,ERNAKULAM

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PETITIONER

TOM THOMAS,
PROPRIETOR, M/S.ROSARY FOODS,
36/896, M.G.ROAD, COCHIN-682 011.

BY ADV. SRI.SHAJI P.CHALY

RESPONDENTS:

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1. ABDUL LATHIEF.E., PROPRIETOR,
ASSAL PRODUCTS, VILAKUMADAM, T.C.48/1013,
NEAR THIRUVALLAM BRIDGE, POONTHURA P.O.,
THIRUVANANTHAPURAM.

2. STATE OF KERALA REPRESENTED
BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.P.P.RAZIYA

THIS CRIMINAL LEAVE PETITION HAVING BEEN FINALLY HEARD ON 11/08/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

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Crl.L.P. No.408 of 2006
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Dated this 11th day of August, 2006.

ORDER

Can an order of dismissal passed under section 204(4) of the code be treated as an order of acquittal? Can such order be challenged in an appeal, under section 378 of the Code of Criminal Procedure (`the code', in short)? These questions arise in this petition for leave to file an appeal under Section 378(4) of the code.

2. Petitioner filed a complaint alleging offence under section 138 of the Negotiable Instruments Act before the Magistrate's court. It was dismissed under section 204(4) of the code, since petitioner failed to take steps after issuing warrant against the accused. Hence, petitioner has filed an appeal against the said order under section 378 of the code, treating it as an order of acquittal. He also filed this petition for special leave to file appeal.

The impugned order passed under 204 of the code can be extracted hereunder:

> "This case was called on for hearing today, to which it had been posted. The complainant has not taken steps in this case. Thereby, this complaint is dismissed U/s.204 of Cr.P.C."

It is clear from the above order that the complaint was "dismissed" under section 204 of the Code. The relevant portion of section 204 of the code reads as follows:

> **"S. 204. Issue of process.—**(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—
>
> (*a*) a summons case, he shall issue his summons for the attendance of the accused, or
>
> (*b*) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.
>
> (2)xxxxxxx
>
> (3) xxxxx
>
> (4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.
>
> (5) xxx ".

Section 204(1) shows that once the court issues summons or warrant under section 204(1) of the code and if the complainant does not pay the process fees or such other fees payable, within a reasonable time, the court may dismiss the complaint under section 204(4) of the code. The present complaint was also dismissed on the ground that the process fee is not paid. Can such an order be challenged in an appeal under section 378 of the code ? Section 378 of the code reads as

hereunder (only the relevant portions which are necessary for the purpose of this proceedings are extracted):

> " **S. 378.Appeal in case of acquittal.--**(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Sessions in revision.
>
> (2) xxxxx
>
> (3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.
>
> (4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.
>
> (5) xxx
>
> (6) xxxx"

4. Learned counsel for petitioner submitted that the impugned order of dismissal of complaint can be treated as an order acquittal of the accused. He placed reliance upon the decision reported in *Ramkumar v. K.M. Mathew* (1988(1) KLT 579) in support of this argument. A reading of the decision shows that the proceedings against certain accused were dropped in that case. It was a summons case. Considering the various provisions of the Act, this court held therein that during an intermediate stage, after issue of process, there is no provision for dropping the proceedings against the accused, as

was done by the Magistrate. Hence, it was held that the order of the Magistrate dropping the proceedings amounted to an order of acquittal without trial.

5. But, the dictum laid down in the above decision has absolutely no application to the present case at hand. This is a case where warrant was issued and coercive steps were taken by the court for compelling presence of the accused, but the complainant failed to take steps and hence the court dismissed the complaint. Such an order falls squarely under section 204 of the code. Sub-section 4 of section 204 provides that a complaint can be dismissed on failure of payment of certain fees etc.

6. When there is a specific provision to dismiss a complaint for non-payment of process fees etc., such an order cannot be treated as an order of acquittal. Had the legislature intended that such order will also amount to an order of acquittal, coming within the purview of section 378 of the code, there was absolutely no difficulty in using the word "acquit" instead of "dismiss" in section 204 (4) of the code. But in the absence of doing so, the only inference possible is that the legislature did not intend to "acquit" an accused for failure of the complainant to pay the requisite fee etc. This court cannot treat an order of dismissal under section 204(4) of the code as order of acquittal, against the clear and unambiguous expressions contained

in the provision. The order of dismissal of a complaint under section 204(4) is therefore, not appealable under section 378 of the Code.

7. The propriety or legality of the impugned order under section 204(4) of the Code cannot be considered in an appeal under section 378 of the Code. The remedy of the petitioner is not to file appeal under section 378 of the Code and hence this petition for special leave also cannot be entertained. However, it is made clear that this order will not stand in the way of the petitioner seeking appropriate remedy available to him under law.

This special leave petition is dismissed.

K. HEMA, JUDGE.

Krs.